In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 560

WINN-DIXIE GREENVILLE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) has not yet been officially reported. The Board's decision and order (J.A. 1-10) are reported at 157 NLRB 657.

JURISDICTION

The decree of the court of appeals was entered on June 2, 1967 (Pet. 1a, 6a). The petition for a writ of certiorari was filed on August 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in assessing the evidence bearing on charges that an employer has unlawfully interfered

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with union activity and discriminatorily discharged an employee, the Labor Board may take note of the employer's numerous prior unfair labor practices as reflected in Board decisions.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at p. 7a of the petition.

STATEMENT

1. THE BOARD'S FINDINGS OF FACT

Petitioner, a wholly owned subsidiary of Winn-Dixie Stores, Inc.,[1] operates a chain of retail food stores in several States, including warehouse facilities in Greenville, South Carolina (J.A. 11–12). In June 1964, the Union[2] began an organizing campaign among the Company's Greenville truckdrivers. A Company handbook ("Drivers Safe Driving Rules") states: "Winn-Dixie has been in business for more than forty years. We now have 18,000 employees and not a single one is represented by a labor union" (G.C. Exh. 2, at p. 25).[3] Winn-Dixie has sought to maintain that record (J.A. 4, n. 4). See *Winn-Dixie Stores, Inc.*, 128 NLRB 574; *Winn-Dixie Stores, Inc.*, 138

[1] See *Winn-Dixie Stores, Inc.* 128 NLRB 574, 583.

[2] General Drivers, Warehousemen and Helpers Local Union No. 509, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] Contrary to petitioner's suggestion (Pet. 3), G.C. Exh. 2 was part of the record before the Board (see J.A. 4, n. 4, 16); it was merely omitted from the printed joint appendix.

NLRB 1355, enforced, 324 F. 2d 502 (C.A. 5), on contempt, 353 F. 2d 76; *Winn-Dixie Stores, Inc.*, 143 NLRB 848, enforced, 341 F. 2d 750 (C.A. 6), certiorari denied, 382 U.S. 830; *Winn-Dixie Stores, Inc.*, 147 NLRB 788, enforced, 361 F. 2d 512 (C.A. 5); *Winn-Dixie Stores, Inc.*, 153 NLRB 273; *Winn-Dixie Stores, Inc.*, 166 NLRB No. 42.

Shortly after the start of the Union's organizing drive, management representative George Miller, asked driver William Green "if anyone had ever contacted" Green about the Union. When Green answered in the negative, Miller observed, "I don't guess they will, knowing the way that you feel about it." (J.A. 13; 91–92.) A few weeks before November 4, 1964, the date of a scheduled Board representation election, Division Manager Kay called William Poe and other drivers to his office. They were warned that the Company "didn't want the Union." Thereafter, Poe was again summoned before Kay, this time alone. Poe told Kay that he was "not having anything to do" with the Union. Kay approved this disclaimer, telling Poe "just to stick with the Company." (J.A. 13; 95–96.)

The Union won the election by a vote of 45 to 44. On November 30, 1964, while Poe was unloading his truck, Kay approached him saying, "Well, I hope you boys got what you want * * * I haven't got much use for a fellow that will look me in the eye and tell me one thing and do another." "A man can change," protested Poe. Kay responded, "Well, we have got forty-four good men with the company, and we are going to look out for them." (J.A. 13; 96–97.)

Driver J. L. Smith was discharged on August 14, 1964, when Superintendent Screws told him that it had "come time for your departure" (J.A. 17; 50–51). The Company had long been aware of Smith's union sympathies. Thus, in 1962, Company Vice-President Clary called Smith to his office and asked, "What the hell is this I hear about you signing up drivers?" (J.A. 16; 52–53). Smith replied that "the only way for him to find out anything about the union was to belong to it" (J.A. 16; 53, 71). And, in June 1964, Screws told Smith that he had heard that Smith was "dissatisfied" with his job and was signing up drivers. When Smith denied this charge, he was told to forget about it (J.A. 12–13; 53–54). Shortly thereafter the Union began its formal organizing campaign, with Smith playing a leading role. Between early July and his discharge in mid-August, Smith signed up some 20 of the 89 drivers (J.A. 15; 49, 66).

On August 12, Smith returned to the warehouse after completing his deliveries (J.A. 4, 16; 49). Ordinarily, returning drivers open the doors of their trucks, thereby enabling the dispatcher to observe what equipment or products were being returned, and the driver to remove any blankets that had been used on the truck (J.A. 4, 16; 60, 62, 77, 79, 83, 86, 89–90). However, this procedure is bypassed, with the approval of the dispatcher, when the trucks are so loaded that it is unsafe to open the rear doors until the truck is positioned at a loading dock (J.A. 5–6, 18, 20, 21; 38, 62, 64, 77, 78–79, 83–84, 87, 88–89). On

August 12, Smith informed dispatcher Butler that empty milk crates were so stacked in his truck that they might fall out if the doors were opened (J.A. 4–5, 16–17, 49–50, 71). Accordingly, Butler authorized Smith to park his truck without opening the doors or removing the blankets (J.A. 5, 17; 50, 70). After Smith departed, Butler reported the matter to Superintendent Screws (J.A. 5, 22, 26; 105, 126–127).

As noted above, Screws discharged Smith on August 14. When Smith asked for an explanation, Screws replied that Smith was "dissatisfied" with his job, had left blankets on his truck on August 12, and on the same day had "[held] up equipment on the road" (J.A. 17–18; 50–51). The latter referred to the fact that Smith had "logged off" an hour for sleep on his trip ticket (J.A. 18–19; 51, 55, 57–58). However, that practice was expected of the drivers if they became sleepy on a trip (J.A. 2; 77, 80, 83, 86). Moreover, at the Board hearing, Screws admitted that the logged-off hour did not bear on his decision to fire Smith on August 12 (J.A. 26). Smith requested a written statement of the reasons for his discharge. The "personnel charge" statement accused Smith of "improper logging," and of leaving on his truck certain equipment (hand trucks and separator nets) which Smith had not used for several years (J.A. 19; 131, 74–76, 120–121). The statement also noted that Smith "seems to have a negative attitude towards his job requirements" (J.A. 5, 20; 131).

Two weeks later, driver S. H. Branson asked Screws whether Smith had indeed been fired for "leaving things on the truck and being 15 or 20 minutes late

for work" (J.A. 6, 21–22; 92–93). Branson was worried that a driver could be discharged "for a small reason like that." Screws admitted that he had "other reasons" which he would not reveal. Branson had worked long enough, Screws added, to know that employees "didn't get run off for no good reason" (J.A. 6, 22; 92–94).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

Upon the foregoing facts, the Board found that the Company had violated Section 8(a)(1) of the National Labor Relations Act by coercively interrogating employees as to their union activities and by threatening reprisals against employees who voted for the Union in the Board representation election (J.A. 1, 14–15). The Board also found that the Company had discharged employee Smith because of his union activities, and not because of alleged violations of Company rules, thereby violating Section 8(a) (3) and (1) of the Act (J.A. 2–8). The Board ordered the Company to cease and desist from the unfair labor practices found and to reinstate Smith with backpay (J.A. 8–10, 31–34).

The court of appeals sustained the Board's findings and enforced its order in full (Pet. 1a–5a).

ARGUMENT

The facts summarized in the Statement (*supra*, pp. 2–6) clearly show, as the court below held, that there is substantial evidentiary support for the Board finding that the Company engaged in unfair labor practices in violation of Section 8(a) (1) and (3) of the Act.

Moreover, there is plainly no merit to the Company's contention (Pet. 4) that the Board and the court below erred in considering the Company's history of prior unfair labor practices (*supra*, pp. 2–3) as a factor in interpreting the conduct of its agents in this case.[4] Obviously, that history, although it alone could not support an unfair labor practices finding, may be utilized to shed light on other probative evidence. Cf. *Local Lodge 1424* v. *National Labor Relations Board*, 362 U.S. 411, 416–417. Nor is *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, to the contrary. There, the Court simply held, "There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases" (369 U.S. at 407). Nothing in *Walton* precludes reference to prior unfair labor practices as background evidence in a subsequent proceeding.

Nor is there any merit in petitioner's contention (Pet. 7) that the earlier *Winn-Dixie* decisions cited by the Labor Board and the court of appeals are irrelevant because they involved a different corporate entity—namely, petitioner's corporate parent. In the first place, in *Winn-Dixie Stores, Inc.*, 128 NLRB 574, the Labor Board held that petitioner, as well as its parent corporation, had engaged in the very types of unlawful interference with union activity found in the present case. Indeed, Manager Kay, whose anti-union activities are discussed above (*supra*, p. 3), was found to have been similarly active on petition-

[4] The Board alluded to the Company's prior unfair labor practices merely as one factor supporting its conclusion that the Company's animus against unions was patent (J.A. 4, n. 4).

er's behalf in that case. Furthermore, contrary to petitioner's suggestion (Pet. 7–8), *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 361 F. 2d 512 (C.A. 5), does not support the proposition that petitioner operates autonomously of the parent corporation with respect to labor policy. The court there referred to the autonomy of Winn-Dixie's operating divisions solely in connection with buying and merchandising functions. The Company's handbook for drivers (G.C. Exh. 2, see p. 2, *supra*), clearly reflects a uniform labor policy throughout the Winn-Dixie organization when it observes: "We now have 18,000 employees and not a single one is represented by a labor union."[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1967.

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[5] Standard and Poor's *Corporation Records* (T–Z), p. 2062 (Oct.–Nov. 1966) gives the total number of persons employed by Winn-Dixie Stores, Inc., as 13,000 full-time and 9,000 part-time.

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